Dennis Lee Kuok Loong v Public Prosecutor

HIGH COURT (KUCHING) — CRIMINAL APPEAL NO SRA-41S-1/7 OF 2013
RHODZARIAH BUJANG J
31 JULY 2013

Road Traffic — Dangerous driving — Causing death — Conviction and sentence — Appeal against — Whether appellant, in overtaking whilst going downhill, created dangerous traffic situation — Whether fallen below standard of care and skill of competent driver — Whether prosecution proved beyond reasonable doubt — Whether conviction entered safe — Whether sentence imposed manifestly excessive — Road Transport Act 1987 s 41(1) & (3)

The appellant was charged and convicted for causing death by dangerous driving under s 41(1) of the Road Transport Act 1987 ('Act') and was sentenced to two years imprisonment and a fine of RM8,000 or in default, six months imprisonment. In addition, he was disqualified from holding a driving licence for three years from the date of his conviction as mandated by s 41(3) of the said Act. He had filed this appeal against his conviction and sentence. In this case, the collision was between a Proton Iswara car driven by PW1 and a Toyota Hilux by the appellant. According to PW1, the accident occurred when the Hilux which was from the opposite direction encroached onto her lane whilst overtaking another vehicle on its lane. As a result of the accident, Isah who was her front passenger, died whilst she and Uni, the other passenger of her vehicle, sustained serious injuries. The appellant in his defence admitted he was going downhill and had slowed down the speed of the car to about 50–60 kmph. As he pressed the brake, the Hilux went out of control and swerved onto the Iswara's lane before colliding with it. According to the appellant, the reason for this was a combination of the wet and slippery road and of some loose gravels on the road. The appellant said that after the collision, the Hilux finally stopped at its own lane and was moved back to the Iswara's lane with the help of passers-by when it was found to be blocking the road. He admitted, however, that he did not inform PW5, the investigating officer, that the Hilux had been moved from its position after the collision. Further, he did not mention the loose gravels on the road in his police report. The learned magistrate disagreed with the appellant's contention that he lost control of the Hilux by applying the brakes on the wet and slippery road and that it was not a case of a sudden and forceful application of the brakes. From the sketch plan and the positions of the vehicles as well as the severe damage sustained by the Iswara which was totally

wrecked in front, he deduced that the impact of the collision was so strong that it spun to the opposite direction.

Held, dismissing the appeal:

(1) For road traffic accident cases, the sketch plan drawn at the scene is a good guide for the court to find who was at fault. The presence of the shattered glasses is normally an indication of the point of impact unless it can be explained otherwise. In this case, the glasses were photographed as to be on the Iswara's lane, as drawn by PW5 in the sketch plan. The fact that the collision occurred on the Iswara's lane was beyond refute because the appellant in his defence admitted that he lost control of the Hilux and encroached onto the Iswara's lane. This admission also takes care of his submission that the Hilux was moved to the Iswara's lane after the collision (see paras 6–7).

(2) It was reasonable that in a matter of seconds before the impact, PW1 could not be expected to know all the details of the car, being overtaken by the appellant and more so when she herself was unconscious after the collision and suffered serious injuries — a broken kneecap and broken ribs which took her five long months to recover (see para 8).

(3) The appellant's version of how the accident happened defies reasoning because if indeed he was travelling at that slow speed of 50–60 kmph before the collision and was braking and slowing the Hilux right before the impact, there was no reason why that impact would have caused such an extensive damage to the Iswara. As the photographic evidence shows, it was virtually a total wreck in front where firemen had to be called to extricate the victims from the car. The impact was so strong that the Iswara spun to the opposite direction. Further, as the loose gravel were an integral part of the appellant's defence, failure to mention that in his police report renders his defence not only unbelievable but it also failed to raise any reasonable doubt on the prosecutions case (see paras 9–10).

[Bahasa Malaysia summary

Perayu telah dituduh dan disabitkan kerana menyebabkan kematian dengan memandu secara berbahaya di bawah s 41(1) Akta Pengangkutan Jalan 1987 ('Akta') dan dijatuhkan hukuman dua tahun penjara dan denda RM8,000 atau jika gagal, enam bulan penjara. Di samping itu, dia hilang kelayakan daripada memegang lesen memandu bagi tiga tahun dari tarikh sabitannya seperti yang dimandatkan oleh s 41(3) Akta. Dia telah memfailkan rayuan ini terhadap sabitan dan hukumannya. Dalam kes ini, perlanggaran adalah antara sebuah kereta Proton Iswara yang dipandu oleh PW1 dan Toyota Hilux oleh perayu. Menurut PW1, kemalangan berlaku apabila Hilux tersebut yang datang dari arah bertentangan memasuki laluan ketika cuba memotong kenderaan lain di laluannya. Akibatnya, Isah yang merupakan penumpang tempat duduk

hadapannya, meninggal dunia manakala dia dan Uni, seorang lagi penumpang kenderaannya, mengalami kecederaan serius. Perayu dalam pembelaannya mengaku bahawa dia sedang menuruni cerun dan telah memperlahankan kelajuan keretanya kepada kira-kira 50–60kmph. Apabila dia menekan brek, Hilux tersebut hilang kawalan dan melencong ke laluan Iswara sebelum berlanggar dengannya. Menurut perayu, sebab berlakunya kemalangan ini adalah gabungan jalan raya yang basah dan licin dan kerikil longgar di jalan raya. Perayu menyatakan bahawa selepas berlakunya perlanggaran, Hilux tersebut akhirnya berhenti di laluannya sendiri dan dialihkan semula ke laluan Iswara dengan bantuan orang yang lalu-lalang apabila ia didapati menghalang jalan raya. Dia mengaku, walau bagaimanapun, bahawa dia tidak memaklumkan kepada PW5, pegawai penyiasat, bahawa Hilux tersebut telah dialihkan daripada kedudukannya selepas perlanggaran. Selanjutnya, dia tidak menyatakan mengenai kerikil longgar di jalan raya di dalam laporan polisnya. Majistret tidak bersetuju dengan hujahan perayu bahawa dia hilang kawalan Hilux tersebut dengan membrek atas jalan raya yang basah dan licin dan bahawa ia bukanlah satu kes pemakaian brek mengejut dan kuat. Berdasarkan pelan lakaran dan kedudukan kenderaan-kenderaan dan juga kerosakan teruk yang dialami oleh Iswara yang rosak sama sekali di bahagian hadapan, beliau menyimpulkan bahawa perlanggaran adalah begitu kuat sehingga ia berpusing ke arah bertentangan.

Diputuskan, menolak rayuan:

(1) Bagi kes-kes kemalangan jalan raya, pelan lakaran yang dilukis di tempat kejadian adalah satu panduan yang baik untuk mahkamah memutuskan siapakah yang bersalah. Kehadiran kaca-kaca yang pecah kebiasannya adalah petanda bermulanya impak kecuali boleh dijelaskan sebaliknya. Dalam kes ini, kaca-kaca yang diambil gambar dilihat berada pada laluan Iswara, seperti yang dilukis oleh PW5 dalam pelan lakaran. Fakta bahawa perlanggaran berlaku di laluan Iswara tidak boleh dipertikaikan kerana perayu dalam pembelaannya mengaku bahawa dia hilang kawalan Hilux dan memasuki laluan Iswara. Pengakuan ini mengesahkan hujahannya bahawa Hilux dialihkan ke laluan Iswara selepas perlanggaran (lihat perenggan 6–7).

(2) Adalah munasabah bahawa dalam beberapa saat sebelum impak, PW1 tidak boleh dijangka untuk mengetahui tentang butir-butir kereta, dipotong oleh perayu dan lebih-lebih lagi apabila dia sendiri tidak sedarkan diri selepas perlanggaran dan mengalami kecederaan serius — tempurung lutut dan tulang rusuk yang pecah yang mengambil masa lima bulan lamanya untuk pulih (lihat perenggan 8).

(3) Versi perayu tentang bagaimana kemalangan berlaku bertentangan dengan hujahan kerana jika benar dia memandu dengan kelajuan 50–60 kmph sebelum perlanggaran dan telah membrek dan memperlahankan

Hilux sejurus sebelum impak, tiada sebab mengapa impak tersebut akan menyebabkan kerosakan besar kepada Iswara. Seperti yang ditunjukkan oleh bukti fotografi, ia adalah hampir kepada kerosakan penuh di bahagian hadapan hinggakan bomba terpaksa dipanggil untuk mengeluarkan mangsa daripada kereta. Impak adalah begitu kuat hinggakan Iswara tersebut berpusing ke arah bertentangan. Selanjutnya, oleh kerana kerikil halus merupakan sebahagian besar daripada pembelaan perayu, kegagalannya untuk menyatakan dalam laporan polisnya menjadikan pembelaannya bukan sahaja tidak boleh dipercayai tetapi ia juga gagal membangkitkan sebarang keraguan munasabah ke atas kes pendakwaan (lihat perenggan 9–10).]

Notes

For cases on causing death, see 11 *Mallal's Digest* (4th Ed, 2013 Reissue) paras 23–32.

Cases referred to

Ramiah v PP [1972] 2 MLJ 258 (folld)

Legislation referred to

Road Transport Act 1987 s 41(1), (3)

Liew Tang Chieh (Tang & Partners) for the appellant.
Musli bin Abdul Hamid (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Rhodzariah Bujang J:

[1] The appellant was charged and convicted of causing death by dangerous driving under s 41(1) of the Road Transport Act 1987 and was sentenced to two years imprisonment as well as RM8,000 fine in default six months imprisonment. In addition he was disqualified from holding a driving licence for three years from the date of his conviction as mandated by s 41(3) of the said Act. He has filed this appeal against his conviction and sentence.

THE ACCIDENT

[2] The collision was between a Proton Iswara car driven by PW1 (Rohana bt Usop) and a Toyota Hilux by the appellant. The Iswara car was from Betong going to Debak with two women passengers, Isah bt Bakar and Uni bt Langejang. According to PW1, the Hilux which was from the opposite direction encroached onto her lane whilst overtaking another vehicle on its lane and she did not have the time to avoid it as it happened too fast and the Hilux was too close. It is to be noted that the road where the collision occurred was

hilly. In fact as photographs of the scene show (p 107, Vol II of the appeal record) it occurred at a bend and PW1's path was the one going uphill. As a result of the accident, Isah who was her front passenger, passed away whilst both she and Uni sustained some very serious injuries. Uni was not called by the prosecution but offered to the defence at the close of the prosecution's case.

[3] In his defence, the appellant admitted he was going downhill whilst on third gear and had slowed down the speed of the car from about 50–60 kmph when, as he pressed the brake, the Hilux went out of control and swerved onto the Iswara's lane before colliding with it. The reason for this, said the appellant, was a combination of the wet and slippery road and of some loose gravels on the road. He said after the collision the Hilux's final stop was at his own lane and was moved back to the Iswara's lane with the help of passer by when it was found to be blocking the road. He admitted, however, that he did not tell the investigating officer ('PW5') that the Hilux has been moved from its position after the collision (see p 71 line 202–203 of the appeal record, Vol 1). He also said it was drizzling at that time.

[4] PW5 testified that he arrived at the scene at 6.30pm and the rain had just stopped. He took photographs of the vehicles as found at the scene which were marked as exh P1(c) for the Iswara and exh P1(g) for the Hilux and they appeared at pp 109–110 of Vol 1 of the appeal record, respectively. Unfortunately, there was no long shot of the vehicles which captures both vehicles in one photograph and for that I had to look at the sketch plan (exh P4) he drew which appeared at p 117 of Vol 1 of the appeal record. According to PW5, the members of the public and the appellant himself told him that the position of the Hilux he drew was as it were after the collision.

[5] In considering his defence, the learned magistrate held that the appellant could not have lost control of the Hilux just by applying the brake even though the road was wet and slippery as it was not a case of a sudden and forceful application of the brake. From the sketch plan and the positions of the vehicles as well as the severe damage sustained by the Iswara which was totally wrecked in front, he deduced that the impact of the collision was so strong that it spun to the opposite direction.

THE SKETCH PLAN

[6] As is generally the case for road traffic accident cases, the sketch plan drawn at the scene is a good guide for the court to find who was at fault. The presence of the shattered glasses is normally an indication of the point of impact unless it can be explained otherwise. In this case the glasses were

photographed in exh P1(K) at p 112 of the appeal record as to be on the Iswara's lane, said PW5 and drawn by him in the sketch plan at p 117 of the appeal record as such.

[7] Although the appellant's counsel tried to argue otherwise in his written submission, the fact that the collision occurred on the Iswara's lane is beyond refute because his own client admitted in his defence that he lost control of the Hilux and encroached onto the Iswara's lane. This admission also takes care of his submission that the Hilux was moved to the Iswara's lane after the collision. The simple issue is what caused the encroachment by the appellant — the overtaking of another vehicle or the braking of the Hilux.

CAUSE OF COLLISION

[8] The learned magistrate has given his reason for disbelieving the appellant's version of how the accident happened as I have stated in the foregoing paragraphs of this judgment. The appellant's counsel disparaged PW1's version of the accident because she failed to remember the registration number, the type brand, model or colour of the vehicle which the Hilux was overtaking. PW5's evidence said counsel is of no help either because his investigation too did not reveal the identity of this other car driver. However, her failure to do so cannot in itself render her evidence inherently incredible because accidents do not happen in slow motion. In the split second that it happened, it is not humanly possible to remember all those details unless one possessed a photographic memory. Further, as the learned deputy public prosecutor has rightly submitted, she was ascending up the hilly road and the appellant descending it when the collision occurred so it is quite natural that she was not able to keep the oncoming vehicle in her full view like if she had been travelling on a straight road. Thus, it is reasonable that in the matter of seconds before the impact, PW1 could not be expected to know all the details of the car being overtaken by the appellant and more so when she herself was unconscious after the collision and suffered serious injuries — a broken kneecap and broken ribs which took her five long months to recover.

[9] On the other hand the appellant's version of how the accident happened defies reasoning because if indeed he was travelling at that slow speed of 50–60 kmph before the collision and was braking and slowing the Hilux right before the impact, there was no reason why that impact would have caused such an extensive damage to the Iswara. As the photographic evidence show (exh P1(c), it was virtually a total wreck in front and firemen had to be called to extricate the victims from the car. The impact was so strong that the Iswara spun to the opposite direction ie instead of facing Debak it was facing Betong.

[10] Further, as submitted by the learned deputy public prosecutor, the

appellant did not mention that loose gravels on the road in his police report (exh P5) at p 118 of the appeal record. The loose gravels are an integral part of his defence because he said it was its combination with the wet and slippery road which caused him to lose control of the Hilux. On these considerations, his defence was not only unbelievable but failed to raise any reasonable doubt on the prosecution's case.

[11] In the circumstances I am of the view that the prosecution has proved beyond reasonable doubt that the appellant, in overtaking whilst going downhill has created a traffic situation which was dangerous and has fallen below the standard of care and skill of a competent driver, elements of the charge as was held in *Ramiah v Public Prosecutor* [1972] 2 MLJ 258. The conviction entered was safe and the appeal against it, dismissed.

[12] With regards to the appeal against sentence, s 41(1) of the said Act prescribes a minimum penalty of two years imprisonment and a minimum fine of RM5,000. He was sentenced to the minimum imprisonment term and the fine of just RM3,000 more than the prescribed minimum cannot be said to be manifestly excessive in any circumstances. Thus, even as I regret that one as young as the appellant, only 25 years of age and with a bright future for he is an engineer with a public listed company, has to suffer a blight to what should be a promising career, the learned magistrate had no choice but to impose that imprisonment term. The alternative, which was to order that he be bound over for good behaviour (given the minimum sentence prescribed by the law) would be simply unthinkable given the fatal consequences of the accident. Therefore, the learned magistrate was not, as submitted by the appellant's counsel, fixated on the deterrence and public interest elements when sentencing the appellant. Thus, his appeal against sentence is similarly dismissed.

Appeal dismissed.

Reported by Ashgar Ali Ali Mohamed